Supreme Court, U.S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLE

NO. 80-592

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

SAMUEL S. SHAW

PETITIONER

VS.

STATE OF KANSAS

RESPONDENT

ON WRIT OF CERTIORARI
TO THE
UNITED STATES SUPREME COURT
FROM THE
SUPREME COURT
OF THE
STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

STEVEN C. SHERWOOD
Attorney at Law
1540 North Broadway
Wichita, Kansas 67214
(316) 262-5313
ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

DID THE TRIAL COURT ERR IN OVERRULING PETITIONER'S MOTION TO SUPPRESS THE STATEMENT GIVEN BY PETITIONER TO AN AGENT OF LAW ENFORCEMENT OFFICERS, OVERRULING HIS OBJECTIONS AND OTHER MOTIONS PERTAINING THERETO, AND DID THE APPELLATE COURTS OF THE STATE OF KANSAS ERR IN SUSTAINING THE TRIAL COURT?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

PETITION 4

GROUNDS FOR INVOKING JURISDICTION 4

CONSTITUTIONAL PROVISIONS 6

STATEMENT OF THE CASE 7

ARGUMENT 11

CONCLUSION 16

APPENDIX I 17

APPENDIX II 23

APPENDIX III 24

APPENDIX IV 27

APPENDIX V 30

APPENDIX VI 34

APPENDIX VII 39

TABLE OF AUTHORITIES

Miranda vs. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 . . . . . 12, 15

United States vs. Carollo, 507 F.2d 50, (5th Cir. 1975) cert. denied, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 105 . . . . 13, 14

United States vs. Jordan, 557 F.2d 1081 (5th Cir. 1977) 13, 14

Title 28, U.S.C. Section 1257(3). 5

U.S. Constitution, Amendment V 6, 11, 15

U.S. Constitution, Amendment VI 6, 15

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL S. SHAW

PETITIONER

VS.

STATE OF KANSAS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES SUPREME COURT

GROUNDS FOR INVOKING JURISDICTION

The Petitioner, Samuel S. Shaw, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion by the Court of Appeals of the State of Kansas, opinion filed July 11, 1980, from which Petition to the Supreme Court of the State of Kansas for review was subsequently denied on September 9, 1980. No times are recorded by these Courts relating to the entry of these decrees, but they are entered by date only.

A copy of the Opinion of the Court of Appeals is attached hereto as Appendix I.

A copy of the Order Denying Review from the Supreme Court of the State of Kansas is attached hereto as Appendix II.

Petitioner submits that the jurisdiction of the Court is invoked under Title 28 USC Section 1257 (3), which reads as follows:

> "(3) By Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution or treaties or laws of the United States, or where any title, right, privilege or immunity especially set up or claimed under the Consitution, treaties or statutes thereof, or commission held or authority exercised under, the United States."

The Petitioner specifically claims that his specific constitutional rights, privileges and immunities against self incrimination and right to assistance of counsel were violated by the admission into evidence in the trial Court of a statement made to a person acting

as an agent for police officers, said statements having been made without Petitioner having been advised of his rights, and without advice of counsel. These substantial federal questions were raised by a Motion to Suppress which was filed prior to the trial (Appendix III).

The Motion to suppress the statements (which were taken by tape recording) was overruled by the trial Court. (Appendix IV) The question was raised again on Petitioner's Motion for New Trial (Appendix V) and also in the Petitioner's appeal to the Court of Appeals to the State of Kansas. (Appendix I)

CONSTITUTIONAL PROVISIONS

The Fifth Amendment, United States Constitution, states:

> "No person...shall be compelled in any criminal case to be a witness against himself, ..."

The Sixth Amendment, United States Constitution, states:

> "In all criminal prosecutions, the accused shall enjoy

the right...to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The Petitioner was charged by complaint/information with one count of Arson, one count of Aggravated Assualt, two counts of Criminal Damage to Property, and one count of Conspiracy, all these counts stemming from the events of the 25th of January, 1978, wherein Mohammed and Paulette Sarraf suffered injury to their mobile home by bullets striking it and the loss, by fire, of an automobile parked near the mobile home. The complaint/information was filed on December 20, 1978. On February 6, 1979, the Petitioner filed a Motion for Suppression (Appendix III) of any statements made by the Petitioner to David C. Day while David C. Day was equipped with the radio transmitter supplied by law enforcement officers, said statements being highly incriminating, and overheard by means of a receiver some distance away, and being taped. The pertinent portion of the Motion to Suppress, that being paragraph

one, was overruled by the Court on the 9th day of February, 1979, the Court's Order being filed of record on March 8, 1979. (Appendix IV) Thereupon, the case came on for trial on the 9th day of April, 1979, and the jury returned a verdict of guilty on all counts on the 17th day of April, 1979. (Appendix VII) During the course of the trial, Petitioner again moved to suppress the taped statement, which was designated State's Exhibit 27, 28, 29 and 30, the last three exhibits being duplicates of the first. (Appendix VI, page 35) The Court overruled said Motion. (Appendix VI, page 38) Motion for New Trial was heard on the 8th day of May, 1979, was overruled, and the Petitioner was sentenced to the Secretary of Corrections for imprisonment for a period of not less than five nor more than twenty years on count one, Arson, for a period of not less than three nor more than ten years on count two, Aggravated Assualt, for a period of not less than one nor more than five years

on each of count three and four, those both being Criminal Damage to Property, and for not less than one and no more than five years on count five, Conspiracy. The last three counts were to run consecutive to counts one and two. (Appendix VII) Thereafter, the Petitioner appealed to the Court of Appeals in the State of Kansas, which Court denied his appeal, (Appendix I) and thereafter, he petitioned for rehearing to the Supreme Court of the State of Kansas, which Petition was denied. (Appendix II)

On or about the 25th day of January, 1978, one Mohammed Sarraf and his wife Paulette were at home in their mobile home. Three bullets struck the mobile home, resulting in Mohammed and his wife calling the police. After that call, the victims noticed their small car parked next to the mobile home in flames, and it subsequently burned completely. Subsequently, the Petitioner's name was mentioned as a possible suspect. Subsequent in-

vestigation revealed that the shots had been fired and the fire in the car had been set by David C. Day. After hearing Day's confession, wherein he stated the Petitioner paid him to do the crimes, the police arranged with Day to go talk to the Petitioner while Day was wearing a wireless transmitter, allowing the police to tape the conversation between the parties. At the time the informant met with the Petitioner at his place of business, the Wichita Police Department was prepared to make the arrest. They had surrounded the business premises and were in a position to control the Petitioner's departure. At trial, the witness Day testified that he knew he was to be arrested when the police came into the place of business and stated that the police told him that the Petitioner was to be arrested at the same time. (Appendix VI, page 35) After the police had put the transmitter on David C. Day, they surrounded the place of business, posting officers both inside and

outside the building, and then upon a signal to David C. Day, Mr. Day engaged in a conversation with the Petitioner, wherein they discussed the burning of the car and the trailer incident. Thereafter, officers entered the business, and the Petitioner was subsequently charged and convicted as previously set forth herein.

ARGUMENT

The Fifth Amendment protects an individual's right to be free from self incrimination. This right protects a criminal Defendant from conviction based on involuntary confession. The Supreme Court of the United States has established procedural safe guards designed to prevent involuntary confessions. Before questioning a suspect, the police must warn him that he has the right to remain silent, that any statement he gives may be used against him and that he has the right to consult retained or appointed counsel before answering. These are the requirements

of Miranda vs. Arizona, 384 U.S. 436, 16 L. Ed.2d 694, 86 S.Ct. 1602. If these procedures are not followed, any statement made subsequent to the initiation of the conversation generally will be inadmissible in the prosecution's case in chief. Miranda vs. Arizona, supra.

The Courts require the Miranda procedures when a person undergoes custodial interrogation. Custodial interrogation is defined in Miranda as:

> "Questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

There are four criteria to be studied in making determination of whether or not an interrogation is custodial in nature. These are:

1. Whether probable cause existed to arrest the suspect,

2. Whether the investigation had focused on the suspect,

3. Whether the police had subjectively intended the individual to be in custody, and

4. Whether the suspect believed that he was in custody.

The determination of whether or not an interrogation is custodial is determined on a case by case approach. United States vs. Jordan, 557 F.2d 1081 (5th Cir. 1977). The Court in United States vs. Jordan, supra, also stated that in a case by case analysis it was not always necessary to find all four of the above stated factors present to call into play the Miranda requirements. In Jordan, the Court also restated its implication of United States vs. Carollo, 507 F.2d 50, 52 (5th Cir. 1975) cert. denied, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 105, that there may be a case where a focus of investigation factor, standing by itself, would be sufficient to require Miranda.

It is clear in the present case that prior to the taking of the statement of the Petitioner by David C. Day, the investigation

had focused on the Petitioner. Police had already obtained the statement of David C. Day incriminating the Petitioner, and they had further advised David C. Day, prior to obtaining the taped statements that they intended to arrest Petitioner. These facts speak the existence of probable cause to arrest the suspect. There is little doubt that the police subjectively intended the individual to be in custody in that they had surrounded the premises where the questioning was to have taken place, placing officers all around the building and in the building itself. The only element missing to satisfy the Miranda requirements is that the Petitioner had no reason to suspect that he was, in fact, in custody. Again, it is not required that all four factors to call into play the Miranda requirements. United States vs. Jordan, supra; United States vs. Carollo, supra. In this case, the police have focused their attention on the Petitioner, Samuel S. Shaw. They had the confession of

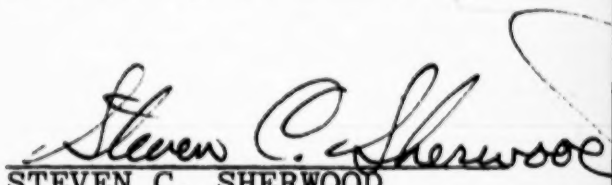
another participant, which clearly implicated the Petitioner, and had surrounded and entered the building wherein the Petitioner was located. They had stated to the agent David C. Day, that they intended to make an arrest as soon as they entered the building. They surrounded the place in such a manner and with the intent that the Petitioner would not be allowed to leave the premises.

Under these facts and circumstances, statements made by Samuel S. Shaw to David C. Day, which were transmitted to and recorded by the Police Department and which were introduced into evidence in State's Exhibits 27, 28, 29 and 30, should have been suppressed for failure of the Police Department to meet the requirements of Miranda and protect the Petitioner's rights under the Fifth Amendment to the United States Constitution, and the Sixth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits Writ of Certiorari should be granted.

Respectfully submitted,



STEVEN C. SHERWOOD
1540 North Broadway
Wichita, Kansas 67214
(316) 262-5313

APPENDIX I

OPINION OF THE COURT OF APPEALS
OF THE STATE OF KANSAS

NOT DESIGNATED FOR PUBLICATION

No. 51,126

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SAMUEL S. SHAW,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court, division No. 1; WILLIS W. WALL, judge. Opinion filed July 11, 1980. Affirmed.

Andrew E. Busch, of O'Hara, Busch, Johnson & Falk, of Wichita, for the appellant.

Ronald D. DeMoss, assistant district attorney, Robert T. Stephan, attorney general, and Vern Miller, district attorney, for the appellee.

Before FOTH, C.J., SPENCER AND SWINEHART, JJ.

SWINEHART, J.: The defendant, Samuel S. Shaw, appeals from his conviction of arson, K.S.A. 21-3718, aggravated assault, K.S.A. 21-3410, two counts of criminal damage to property, K.S.A. 1979 Supp. 21-3720, and conspiracy, K.S.A. 21-3302.

The defendant alleged three grounds of error, one of which was abandoned on oral argument. Thus, only the alleged prejudicial remarks of the prosecutor and improper admission of statements will be considered.

During cross-examination of a defense witness and after defendant's counsel objected to a question as being beyond the scope of direct examination and irrelevant, the prosecutor retorted: "Well, now, if Mr. Shaw would like to testify concerning the character of Mr. Payne (the testifying witness) he could certainly take the stand." Defendant's counsel again objected and requested

that the jury be instructed to disregard that statement of the prosecutor. The court overruled the objection to the original question asked on cross-examination, admonished the jury to disregard the comment about defendant's privilege to take the stand and testify, and further admonished the prosecutor as to the scope of his examination.

Assuming that the prosecutor's comment constituted an improper reference to defendant's right against self-incrimination, it cannot be characterized as basis for reversal in view of the court's immediate admonishment and the overwhelming evidence of guilt. State v. Ponds, 227 Kan. 627, 608 P.2d 946 (1980); State v. Henderson, 226 Kan 726, 603 P.2d 613 (1979).

Defendant further contends that the court erred by admitting into evidence a tape recording of incriminating statements that he made to an agent of the Wichita Police Department without prior Miranda warnings.

The facts material to the resolution of this question are not in dispute. The tape recording was of a conversation between the defendant and his former employee who was acting as a police informant. According to the police, the informant's story standing alone was not sufficient to make the arrest. Thus, the recording which was taken just prior to defendant's arrest was necessary to confirm information provided by the agent.

At the time the informant met with the defendant at his place of business, the Wichita Police Department was prepared to make the arrest. They had surrounded the business premises and were in a position to control defendant's departure. However, without question, the defendant was unaware of this situation at the time the conversation was taped. Our question is whether the defendant's Fifth Amendment rights were violated.

Defendant cites Miranda v. Arizona,

384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966); United States v. Jordan, 557 F.2d 1081 (5th Cir. 1977); and United States v. Carollo, 507 F.2d 50, 52 (5th Cir.), cert. denied 423 U.S. 874 (1975), to support his position. However, the facts of the present case make it distinguishable from the above mentioned cases. In the present case none of the safeguards protected by Miranda were breached. There was no showing that defendant realized he and his place of business were surrounded by police; that he was being interrogated or giving a statement to a police officer or agent of the police; or that he was under any apprehension, coercion or intimidation while talking to his former employee whom he did not know was acting in a dual capacity.

Defendant's contention that his Fifth Amendment rights were violated is without merit. State v. McCorgary, 224 Kan. 677, 585 P.2d 1024 (1978); State v. Jordan, 220 Kan.

110, 551 P.2d 773 (1976).

Judgment is affirmed.

APPENDIX II

OPINION OF THE SUPREME COURT OF THE STATE OF KANSAS

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,)
)
v.) No. 51126
)
Samuel S. Shaw, Appellant.)
)

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Date September 9, 1980

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

APPENDIX III

MOTION TO SUPPRESS

ANDREW E. BUSCH
Attorney at Law
732 North Topeka
Wichita, Kansas 67214
265-6624

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SAMUEL S. SHAW aka SAM BUTT, aka MOHAMMAD S. BUTT, Defendant.	Case No. 78CR2100

MOTION

COMES NOW, the defendant and moves the court for an Order requiring the suppression of any and all statements and recordings of said statements obtained by the prosecution:

1. Through the use of participant monitoring whereby statements made by the

defendant in a private place to another participant, to-wit: David C. Day, while said David C. Day was equipped with a radio transmitter, supplied by agents of the plaintiff, which were overheard by police by means of a receiver located some distance away, for the reason that such action by law enforcement agencies constitutes a search and seizure which was unreasonable in the absence of a search warrant, and testimony to overheard conversations under such circumstances must be ruled inadmissable.

2. Any statements made by the defendant to David C. Day while said David C. Day and this defendant were in custody in Sedgwick County Jail and this defendant was unaware that said David C. Day was acting in the capacity of the agent of the law enforcement agency.

/s/ Andrew E. Busch
Andrew E. Busch
Attorney for defendant

NOTICE OF HEARING

Please take note that the above Motion will be heard before the Honorable Judge Elliott Fry, Position A, 6th floor, South Court, Sedgwick County Courthouse, Wichita, Kansas on the 9th day of February, 1979, at 9:30 o'clock A.M., or as soon thereafter as the Court may reach the same.

/s/ Andrew E. Busch
Andrew E. Busch

CERTIFICATE OF SERVICE

I, Andrew E. Busch, do hereby certify that I mailed a true and correct copy of the above and foregoing Motion to Jim Turner, Assistant District Attorney, Sedgwick County, Courthouse, 535 North Main, Wichita, Kansas 67203 on this 2nd day of February, 1979.

/s/ Andrew E. Busch
Andrew E. Busch

APPENDIX IV

ORDER OVERRULING MOTION TO SUPPRESS

JIM TURNER
Assistant District Attorney
Sedgwick County Court House
Wichita, Kansas 67203

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 78CR2100
SAMUEL S. SHAW, also known as SAM BUTT, also known as MOHAMMAD S. BUTT, Defendant.	)	Division No. 5

O R D E R

NOW, on this 9th day of February, 1979, this matter comes on for hearing on defendant's motion to suppress filed herein. The State appears by Assistant District Attorney, Jim Turner, and the defendant appears in person and by his attorney, Andrew Busch.

The Court, after hearing evidence

and arguments of counsel and being fully advised in the premises finds as follows:

1. As to Paragraph No. 1 of defendant's motion, the Court that that portion of defendant's motion should be and the same is hereby overruled;

2. As to Paragraph No. 2 of defendant's motion, the Court finds that there is insufficient evidence before to Court for the Court to rule; that if evidence comes to light, a hearing will be held before such evidence is introduced.

IT IS THEREFORE BY THE COURT ORDERED that Paragraph 1 of defendant's motion is overruled; IT IS FURTHER ORDERED that as to paragraph 2, there is presently insufficient evidence before the Court; that if such evidence comes to light, this Court will hold a hearing before its introduction.

IT IS SO ORDERED.

/s/ James J. Noone
JUDGE JAMES J. NOONE

/s/ James D. Turner
JIM TURNER
Assistant District Attorney

/s/ Andrew E. Busch
ANDREW BUSCH
Attorney for Defendant

APPENDIX V

MOTION FOR NEW TRIAL

ANDREW E. BUSCH
Attorney at Law
732 North Topeka
Wichita, Kansas 67214
265-6624

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	
vs.	Case No. 78CR2100
SAMUEL SHAW, Defendant.	

MOTION FOR NEW TRIAL

COMES NOW the Defendant, Samuel S. Shaw, in the above entitled matter, by and through his attorney, Andrew E. Busch, and respectfully moves this Honorable Court for an Order setting aside the verdict of the jury entered herein on the 17th day of April, 1979, and granting this defendant a new trial for the following reasons:

1) The Court erred in failing to dismiss Count 5 of the Complaint and Information, Conspiracy, herein at the close of the State's evidence and at the motion of the defendant for the reason that the record was without sufficient evidence to make a prima facie case against the defendant on that Count by which a jury could convict in accord with the law.

2) The Court erred in failing to dismiss Count 2 of the Complaint and Information, Aggravated Assualt, herein at the close of the State's evidence and at the motion of the defendant for the reason that the record was without sufficient evidence to make a prima facie case against the defendant on the Count by which a jury could convict in accord with the law.

3) The Court erred in failing to instruct the jury as requested by the defendant that:

> "An accomplice witness is one who testifies that he was involved in

the commission of the crime with which the defendant is charged. You should consider with caution the uncorroborated testimony of an accomplice witness." (PIK 52.18)

4) The Court erred in allowing the admission into evidence, over the objection of the defendant, of the States' Exhibits 27 & 30 which were obtained on violation of defendant's rights under the 4th and 5th Amendments to the United States Constitution.

WHEREFORE by reason of the above and foregoing and in the interest of justice, the defendant earnestly prays this Honorable Court to grant this motion for a new trial.

/s/ Andrew E. Busch
Andrew E. Busch
Attorney for Defendant

NOTICE OF HEARING

Please take note that the above Motion for a New Trial will be heard before the Honorable Willis Wall, Division 1, 6th floor, Sedgwick County Courthouse on the 4th day of May at 9:00 o'clock a.m., or as soon thereafter as the Court may reach the same.

/s/ Andrew E. Busch
Andrew E. Busch

CERTIFICATION

I, Andrew E. Busch, hereby certify that I mailed a true and correct copy of the above and foregoing Motion for a New Trial to Jim Farmer, Assistant District Attorney, Sedgwick County Courthouse Annex, 535 North Main, Wichita, Kansas 67203 on this 27th day of April, 1979.

/s/ Andrew E. Busch
Andrew E. Busch

APPENDIX VI

PERTINENT PORTIONS OF THE TRIAL TRANSCRIPT

(TRIAL TRANSCRIPT, PAGE 217)

A. Yes.

Q. And the fact that you wanted some help from them for your sentence didn't have anything to do with it?

A. Well, when I talked to Schrader and Pat Taylor about it might help me, and they said they didn't think so, and I got most of my help -- it was from my lawyer.

Q. Well, didn't they say they'd talk to the District Attorney for you if you helped them?

A. I think -- I think they did, but --

Q. You do or you don't think?

A. They said they would, but they couldn't guarantee anything.

Q. What did they tell you would happen that night if you went down there with the body pack on?

A. I was still going to be arrested.

Q. Did they say they were going to arrest Mr. Shah, too, that night?

A. Uh-huh.

Q. Did they -- would you answer out loud, please?

A. Yes.

Q. They told you that before they wired you up?

A. (Witness nods head affirmatively.)

Q. Is that a yes, please?

A. The way they was talking I understood it to be that they were going to -- I knew I was going to be arrested when they walked in.

(TRIAL TRANSCRIPT, PABE 229, LINE 1, THROUGH PAGE 230, LINE 9.)

MR. BUSCH: If I might, Your Honor, at this point I would renew my motion to suppress those tapes in light of the testimony of David Day in that the police had already

indicated that it was their intent to arrest Mr. Shah at the Stage Door Inn prior to that time. It's obvious at this point that the investigation had centered on this individual. They were going down there -- they were going to arrest him. He should have been advised of his Miranda rights. They sent their own agent in, had him wired for sound, and I feel that he should have been advised of his rights under Miranda at that point since the investigation had centered on him. Since there is already in evidence an intent to make the arrest, the tapes should be suppressed.

MR. TURNER: The matter has already been heard by Judge Noone.

MR. BUSCH: Well, that evidence was not before Judge Noone, and it was in dispute at that time.

MR. TURNER: The State can review all of the cases that were brought before Judge Noone, if it has a minute to refresh its memory, if there's any need to.

MR. BUSCH: Your Honor, the motion was made before Judge Noone, but that evidence was not presented to the Court at that time.

THE COURT: It appears that Judge Noone did overrule that motion and your previous motion in February of '79.

MR. BUSCH: That is correct, Your Honor.

THE COURT: And --

MR. BUSCH: But, there was not an evidentiary hearing held at that time, and he was unaware of the evidence that was presented to the Court today regarding the intent of the law enforcement agent to arrest Samuel Shah prior to the taking of these statements.

(TRIAL TRANSCRIPT, PAGE 233, LINE 5 THROUGH LINE 21.)

MR. BUSCH: If it please the Court, if I might reply. I'm sure I have read the case, but I'm not sure if it's the one I'm thinking of. In this particular case I believe they were talking about a taped state-

ment that was used in rebuttal evidence. It may or may not have been the case. I would ask Your Honor to check on that.

Also, in that case there was no statement anywhere in the evidence, nor was there one recited by Mr. Turner, that they were going to arrest him. There's a statement to that effect in this case, Your Honor, that they were going to arrest him that night. That's what they told Mr. Day before they left and went down there.

THE COURT: This matter has already been ruled on. The Court is going to go on the fact that the motion was overruled by Judge Noone and that this motion at this time is overruled.

APPENDIX VII

JOURNAL ENTRY OF JUDGMENT OF TRIAL COURT

JAMES D. TURNER
Assistant District Attorney
Sedgwick County Courthouse
Wichita, Kansas 67203
268-7281

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	
vs.	Case No. 78CR2100
SAMUEL S. SHAW a/k/a SAM BUTT a/k/a MOHAMMAD S. BUTT a/k/a SAMUEL S. SHAH, Defendant.	Division No. 1

JOURNAL ENTRY OF JUDGMENT

On this 9th day of April, 1979, this case comes on for trial, the defendant having heretofore been served a copy of the Information charging him with Arson, Count One, contrary to K.S.A. 21-3718; Aggravated Assault, Count Two, contrary to K.S.A. 21-3410; Criminal Damage to Property, Count

Three, contrary to K.S.A. 21-3720; Criminal Damage to Property, Count Four, contrary to K.S.A. 21-3720 and with Conspiracy, Count Five, contrary to K.S.A. 21-3302. The State of Kansas appears by its attorney, James D. Turner, Assistant District Attorney. The defendant appears in person and by his attorney, Andrew E. Busch.

Thereupon, a Jury is duly impaneled and sworn and evidence is presented, the trial being adjourned from court day to court day until both sides rest.

Thereafter, on the 17th day of April, 1979, the Jury after having received the evidence, the instructions of the Court, the arguments of counsel and having duly deliberated, returned the following verdicts in open court:

> "We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of the crime of Arson as charged in Count One. (Please state either "guilty" or "not guilty" in accordance with the verdict of the jury.)

Date of this verdict 4-17, 1979.

/s/ Douglas R. Gibb
Foreman"

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of the crime of Aggravated Assault as charged in Count Two. (Please state either "guilty" or "not guilty" in accordance with the verdict of the jury.)

Date of this verdict 4-17,1979.

/s/ Douglas R. Gibb
Foreman"

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of the crime of Criminal Damage to Property as charged in Count Three. (Please state either "guilty" or "not guilty" in accordance with the verdict of the jury.)

Date of this verdict 4-17,1979

/s/ Douglas R. Gibb
Foreman"

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of the crime of Criminal Damage to Property as charged in Count Four. (Please state either "guilty" or "not guilty" in accordance with the verdict of the jury.)

Date of this verdict 4-17, 1979

/s/ Douglas R. Gibb
Foreman"

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of the crime of Conspiracy as charged in Count Five. (Please state either "guilty" or "not guilty" in accordance with the verdict of the jury.)

Date of this verdict 4-17, 1979

/s/ Douglas R. Gibb
Foreman"

Thereupon, the Court accepted the verdicts and continues this case for sentencing and/or motion for new trial to be heard on May 8, 1979.

Thereafter, on the 8th day of May, 1979, all parties appear as aforesaid. Defendant's Motion for New Trial is heard by the Court, who, after reviewing the file, hearing the statements of counsel and being fully advised in the premises, overrules said motion.

The Court inquires of the defendant if he has any legal cause to show why judg-

ment of sentence should not be pronounced against him; the defendant failing to show any such cause and none appearing, there being none, the Court then proceeds to pronounce judgment of sentence against the defendant as follows:

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant is hereby committed to the custody of the Secretary of Corrections for imprisonment for a period of not less than five (5) nor more than twenty (20) years on the charge of Arson, Count One, contrary to K.S.A. 21-3718 and in accordance with K.S.A. 21-4501(c); and for a period of not less than three (3) nor more than ten (10) years on the charge of Aggravated Assault, Count Two, contrary to K.S.A. 21-3410 and in accordance with K.S.A. 21-4501(d); and for a period of not less than one (1) nor more than five (5) years each on the charges of Criminal Damage to

Property, Count Three and Count Four, both contrary to K.S.A. 21-3720 and on the charge of Conspiracy, Count Five, contrary to K.S.A. 21-3302, all in accordance with K.S.A. 21-4501(e). Counts Three, Four and Five shall run concurrent with each and consecutive to Count One and Two. Defendant shall pay the costs of this action to the Clerk of this Court, including witness fees and miscellaneous expenses.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment and commitment to the Sheriff of Sedgwick County, Kansas, or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of the defendant and said Sheriff or authorized deputy transport the defendant to the custody of the Secretary of Corrections for imprisonment and make due return thereof.

IT IS FURTHER ORDERED that for the

purpose of computing defendant's sentence, his parole eligibility and conditional release dates thereunder, that such sentence shall be computed from April 17, 1979.

IT IS SO ORDERED.

/s/ Willis W. Wall
WILLIS W. WALL, JUDGE

APPROVED BY:

/s/ James D. Turner
JAMES D. TURNER
Assistant District Attorney

/s/ Andrew E. Busch
ANDREW E. BUSCH
Attorney for Defendant